No. 96101497 (2)

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In The

Supreme Court of the United States

October Term, 1996

THE CITY OF MORENO VALLEY; FRANK GARCIA; QUENTIN K. STROM; ANDREW RODRIGUEZ; RON SMITH,

Petitioners,

vs.

DESERT OUTDOOR ADVERTISING, INC. AND OUTDOOR MEDIA GROUP, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENTS' BRIEF IN OPPOSITION

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EDITOR'S NOTE

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QUESTIONS PRESENTED FOR REVIEW

Respondents Desert Outdoor Advertising, Inc. and Outdoor Media Group, Inc. ("Respondents") do not accept Petitioners' statement of the questions that would be presented for review if the petition for certiorari were granted. Respondents respectfully submit that the questions that would be presented would be the following:

I. Whether billboard operators have standing to challenge the constitutionality of a city sign ordinance where (a) the city brings enforcement proceedings against the operators to force removal of their signs; (b) the operators' injury is directly traceable to the city's adoption and enforcement of the ordinance and (c) a declaration that the ordinance is unconstitutional would likely redress the operators' injury by allowing them to maintain their signs.

II. Whether billboard operators must obtain a conditional use permit for their signs under a local sign ordinance where (a) the permit requirement only applies to signs that carry certain messages, including political messages; and (b) city officials may deny a permit on grounds of "a harmful effect upon the health or welfare of the general public" or detriment "to the aesthetic quality of the community."

III. Whether a sign ordinance violates the First Amendment with respect to commercial

speech where (a) it contains no statement of purpose showing that it is enacted to further a substantial governmental interest; and (b) no evidence is produced to show that the ordinance's sign restrictions further such an interest.

IV. Whether a sign ordinance violates the First Amendment with respect to non commercial speech where it (a) allows signs bearing commercial messages in zones where signs that bear political and other noncommercial messages are excluded; and (b) exempts from any regulation under the ordinance certain kinds of noncommercial messages on the basis of content.

V. Whether the unconstitutional portions of a local sign ordinance should be severed where those portions are (a) the permit requirement; (b) the regulations relating to commercial signs; and (c) the regulations relating to noncommercial signs.

VI. Whether city employees who were involved in enforcing the ordinance are entitled to qualified immunity, where the ordinance violates clearly established constitutional rights as articulated in opinions of this Court.

Respondents submit that this Court has definitively decided each of these questions and that in issuing its opinion in this case, the Ninth Circuit Court of Appeals correctly applied this Court's decisions.

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Respondent.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Desert Outdoor Advertising, Inc. and Outdoor Media Group, Inc. ("Respondents") respectfully urge the Court to deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Ninth Circuit. The opinion of the Court of Appeals is reported at 103 F. 3d 814 (9th Cir. 1996). (For the convenience of the Court, all reference to the opinion herein will be to the slip opinion attached to the petition as Exhibit A.)

STATEMENT OF JURISDICTION

This action was commenced in the United States District Court for the Central District of California. Pursuant to 28 U.S.C. §§ 1331 and 1343, the district court had jurisdiction over Petitioners' civil rights claims, brought pursuant to 42 U.S.C. § 1983, for violation of Petitioners' rights under the First and Fifth Amendments of the United States Constitution. The Court of Appeals had jurisdiction to review the district court's order granting Petitioners' motions for summary judgment and judgment on the pleadings and denying Respondents' motion for summary judgment, pursuant to 28 U.S.C. § 1291. The Court now has jurisdiction over the petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. HISTORY OF THE LITIGATION

This litigation involves two signs within the City of Moreno Valley ("the City"). Respondent Desert Outdoor Advertising, Inc. ("Desert") owns one of the signs and Respondent Outdoor Media Group ("OMG") owns the other, The Desert sign was built on or about March 1, 1986 on land not then within the City limits. By a resolution that took effect December 1, 1987, the City annexed the site of Desert's sign. The OMG sign was built in or about May, 1988, within the City limits. The City's sign ordinance ("The Ordinance (§19.3 a (1)) forbids the placement of an outdoor advertising display in the zones where the two signs are located. Neither Desert nor OMG submitted to the City's permit requirement by applying for a conditional use permit for either sign.

This litigation began on February 22, 1988, when the City sued Desert in state court to compel removal of Desert's sign on the grounds that it violated the Ordinance's zoning restrictions. On June 28, 1988, Desert and OMG filed the present action in federal court, alleging that the Ordinance's permit requirement and its zoning prohibitions on Respondents' signs violated the First and Fifth Amendments, as well as the California Constitution and other provisions of state law. The City responded with an action brought in state court on December 16, 1988, which sought removal of the OMG sign on the grounds that it too violated the Ordinance.

On or about March 24, 1989, Petitioners moved to dismiss the federal action on *Younger v. Harris*, 401 U.S. 33, 91 S.Ct. 746 (1971) grounds. Over Respondents'

opposition, the district court abstained pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S 496, 61 S.Ct. 643 (1941). After initially dismissing the case, the court by order of July 14, 1989 stayed the action pending resolution of Respondents' state-law claims in state court. The district court reserved jurisdiction over Respondents' federal constitutional claims.

Four years of litigation in the state courts ensued. During that litigation, Petitioners sought summary judgment on Petitioners' federal constitutional claims. Respondents were forced to obtain a preliminary injunction on January 25, 1991, to preserve their right to litigate their federal claims in federal court.

Respondents viewed the local state court as a forum hostile to their constitutional claims. Concerned about the potential *res judicata* effects of an adverse judgment on their state constitutional claims, Respondents voluntarily dismissed them. With only Respondents' non-constitutional claims under state law remaining, the action proceeded to judgment in the state court. On or about June 12, 1991, the City obtained a judgment against OMG on the remaining state law issues. On or about July 25, 1991, the City obtained a judgment against Desert. OMG unsuccessfully appealed the judgment. On or about June 3, 1993, the City filed a notice of conclusion of the state court proceedings.

Pretrial proceedings and cross-motions for summary judgment ensued in the federal action. On or about November 4, 1994, the City moved for summary judgment on Respondents' constitutional claims. The individual Petitioners also moved for judgment on the pleadings on the grounds of qualified immunity.

Respondents opposed the motion and filed a cross-motion for summary judgment on or about December 23, 1994. By order of March 16, 1995, the district court granted Petitioners' motions and denied Respondents'. The district court's order (Petition, Appendix C) contained no statement of the district court's reasoning. The district court later refused to provide such a statement in response to a motion Respondents brought during the appeal.

Respondents timely appealed from the district court's order. In an opinion dated December 20, 1996, the Ninth Circuit reversed the district court's judgment and held the Ordinance unconstitutional in its entirety.

B. CORRECTION OF MISSTATEMENTS IN THE PETITION

1. *Misrepresentations Concerning the Permit Requirement*

Petitioners assert (Petition at 5-6) that the permit requirement is content-neutral and that it is not a restriction on speech at all. These assertions are false. Section 19.3 c (1) of the Ordinance (Appendix at B-7) requires a permit for the construction of an "outdoor advertising display" ("Display"). Section 19.2 a. of the Ordinance defines a Display as an outdoor advertising sign or structure "*used for the display of political messages and the promotion of products, goods, services or business establishments not conducted, manufactured, or sold upon the premises where the [D]isplay is located.*" (Emphasis added.) The Ordinance thus defines a Display as an outdoor advertising sign or structure that bears a political

or other "off-premise" message. The permit requirement is clearly based on speech.

The above discussion disposes of Petitioners' false assertion (Petition at 6) that the permit requirement is somehow analogous to a content-neutral building permit for a theater or a church. Petitioners' analogy fails because the Ordinance does not require a permit for every outdoor advertising sign or structure (*See* Ordinance, § 19.2 b., c., Appendix at B-2), but only for Displays (§19.3 a.), *i.e.*, signs or structures that bear political or other off-premise messages. An analogous requirement for a theater or church would require a permit for a theater that shows certain kinds of films or a church of a specified denomination.

Petitioners falsely seek (Petition at 5-6) to bootstrap this defect in the permit requirement into a criticism of the Ninth Circuit's opinion. According to Petitioners, a sign is necessarily without content at the time it is built. Therefore, they argue, the Ninth Circuit erred in finding the permit requirement content-based. As shown above, however, the permit requirement is content-based on its face, In practical terms, a prospective builder of a sign would have to consider whether she intended the proposed sign to carry a political or other message that would make the sign a Display, and decide accordingly whether to apply for a permit. Otherwise, the Sign owner would face the prospect that the permit requirement could be retroactively enforced against an unpermitted sign that bore the kind of message that would make it a Display. These effects follow from the Ordinance's selective imposition of a permit requirement on signs that bear disfavored messages. They are not reflective of any deficiencies in the Ninth Circuit's

opinion.

Petitioners also falsely assert (Petition at 5-6) that the Ninth Circuit engaged in an "eccentric" analysis of the permit requirement in finding that it vested unbridled discretion in City officials. This purported eccentricity stems from the Ninth Circuit's taking seriously the language of § 19.3 (Appendix at B-4) that subjects a permit application to such nebulous criteria as "welfare of the general public." In § 19.3 (Appendix at B-4), the ordinance requires a permit for the erection of a Display, "subject to all provisions in the City's zoning ordinances relating to conditional use permits." The ordinance then provides:

> "Said conditional use permit shall *also* be subject to the findings that such a display will not have a harmful effect upon the *health or welfare of the general public and will not be detrimental to the aesthetic quality of the community or the surrounding land uses.*" (Emphasis added.)

By using the word "also," the Ordinance makes unmistakably clear that the City could deny a conditional use permit for a Display on such vague grounds as "welfare of the general public" and "aesthetic quality of the community." Petitioners, however, ignore the plain language of the Ordinance and attempt to minimize it as part of a mere "prefatory" paragraph. Petitioners thus maintain that some language of the Ordinance (*i.e.*, that which hurts their case) should not be taken seriously, "Prefatory"' or not, the above language is much the same as the permit "standards" this Court held unconstitutional in *Shuttlesworth v. City of*

Birmingham, 394 U.S. 147, 89 S.Ct. 935 (1969).

2. *Misrepresentations Concerning the Sign Retaliations*

Petitioners falsely assert (Petition at 8) that the Ninth Circuit somehow held that a municipality may not post weed abatement or traffic signs "without opening itself up to unlimited numbers of billboards, signs, posters and the like. That is by no means what the Ninth Circuit held. In its opinion (Appendix at A-13-14), the court held that the City could not ban signs bearing political and other noncommercial messages from certain zones while allowing signs bearing other noncommercial messages in such zones. The Ninth Circuit's holding fully comports with this Court's pronouncements that a city is not free to pick and choose among noncommercial messages on the basis of content. *Metromedia Inc. v. City of San Diego,* 453 U.S. 490, 515, 101 S.Ct. 2882 (1981) ("With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse.")

The City erroneously argues (Petition at 8) that only the district court's granting of Petitioners' motions, and not the denial of Respondents' motion for summary judgment, was raised on appeal. This assertion is false. Respondents appealed from the district court's final order of March 16, 1995 (Appendix at C-1), which included both the granting of Petitioners' motions and the denial of Respondents'. *See Abend v. MCA, Inc.*, 863 F.2d 1465, 1482 n. 20 (9th Cir. 1988), *affirmed sub nom. Stewart v. Abend,* 495 U.S. 807,110 S.Ct. 1750 (1990).

The City failed to adduce any evidence that the Ordinance's content-based restrictions on commercial

Displays (i.e., signs that bear political or other off-site commercial messages) actually advance its claimed interests in safety and aesthetics. This Court has recognized that a governmental entity must affirmatively justify content-based restrictions on commercial speech. *Rubin v. Coors Brewing Co.*, 514 U.S 476,115 S.Ct. 1585, 1591 (1995); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469,480,109 S.Ct. 3028 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n. 20, 103 S.Ct. 2875 (1983). In line with the above authorities, the Ninth Circuit required the City to produce evidence that the Ordinance's restrictions on commercial speech furthered the substantial governmental interests the City sought to invoke in its court filings. The City failed to produce any such evidence and the Ninth Circuit accordingly held that the Ordinance failed the second prong of the test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343 (1980).

Petitioners falsely assert (Petition at 9) that evidence to justify the Ordinance's content-based restrictions on commercial speech "cannot possibly exist" because of Respondents' two signs. According to Petitioners, the efficacy of the sign restrictions cannot be tested because Respondents' two signs "were never removed," thereby making it "impossible for anyone to know what the effect of the law would have been had it been observed." In other words, the existence of Petitioners' two signs made it impossible to develop evidence --anywhere in the world-- showing the efficacy of the City's sign restrictions.

The City's position is absurd. If the restrictions actually promoted safety or aesthetics, the City could

have submitted expert testimony or other evidence showing that they did so. Petitioners may be right that such evidence does not exist, but the reason it does not exist is that the Ordinance's arbitrary, content-based restrictions bear no relationship to any legitimate governmental interest.

Petitioners also misstate (Petition at 9-11) the Ninth Circuit's decision in regard to noncommercial speech. According to Petitioners (*id.* at 9), this Court in *Metromedia* held that a City could regulate "billboards" or ban them altogether without reference to the way in which it regulated other signage. This statement is false. The *Metromedia* majority held the City's ban on noncommercial billboards unconstitutional because the city permitted on-site commercial signs, thereby preferring commercial over noncommercial speech. *Id.*, 453 U.S. at 512-517.

Petitioners' use of the term "billboards" is also misleading in the context of the Ordinance. The Ordinance does not purport to regulate "billboards". It regulates Displays and other categories of signs, most of which are defined in § 19.2. Nowhere in these definitions does the term "billboard" even appear. In invalidating the Ordinance, the Ninth Circuit did not address "billboards," except to the extent that signs commonly thought of as billboards are encompassed by the regulatory categories defined in the Ordinance.

In a confusing discussion (Petition at 10-11), Petitioners assert that the Ordinance does not restrict political signs and other Displays more than it restricts On-Site Signs (*See* §§ 19.2e. (erroneously typed "3"), 19.4). The Ordinance, they argue, allows Displays to be

larger than On-Site Signs. Respondents' only "violations" of the Ordinance (as reflected in ¶ 5 F. of the pretrial order), however, were the placement of their signs in zones where Displays were forbidden and their failure to obtain City permits. The issue before the Ninth Circuit therefore was whether the Ordinance's zoning restrictions and permit requirements violated the First Amendment. The Ordinance, which allows commercial on-site signs of a limited size in all commercial zones but forbids political signs of any size to be placed in some of those zones, is unconstitutional under *Metromedia*, 453 U.S. at 512.

With respect to the qualified immunity issue, Petitioners again misstate the record. Petitioners assert (Petition at 14) that it was somehow stipulated that the individual Petitioners had only sought to enforce the Ordinance by filing court actions. Nowhere in ¶ 5, the "stipulated facts" section of the pretrial order, is any such fact stated. Moreover, in ¶¶ U.-BB. of the pretrial order, Respondents sought to raise numerous issues regarding enforcement of the Ordinance, including coercion by the City; attempts to have Respondents' state permits for the subject signs revoked; intimidation and harassment of Respondents by City personnel; repeated sending of violation notices by City personnel; threats of criminal prosecution; attempts to promulgate and enforce an illegal ordinance; whether Petitioner interfered with Respondents' contractual and prospective business relations; and whether Petitioners defamed Respondents. Similar allegations were contained in ¶ 16 of the complaint.[1]

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[1] In ¶ 16, Respondents alleged that Petitioners had engaged in a campaign of coercion against Respondents. "Such conduct," Respondents alleged, "includes . . . issuance of notices of violation, the threat of criminal and civil

Petitioners disputed whether the above issues were properly in the case, but Respondents quite clearly sought to raise them at trial. Contrary to petitioners' misstatement of the record, therefore, the parties had by no means "stipulated' that the only enforcement vehicle had been the filing of lawsuits.

Petitioners also misstate the record when they assert (Petition at 15) that "judicial officers" have not found that the Ordinance vests "unbridled discretion" in City officials to issue a permit. Only one "judicial officer," who refused a direct request for a statement of his reasoning, held in favor of the individual Petitioners' qualified immunity defense. The issue was not even presented to the state courts. Three "judicial officers" on the Ninth Circuit Court of Appeals, who stated in detail the basis for their conclusion, held that the permit requirement does vest unbridled discretion on City officials.

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prosecution., initiation of a civil action regarding the Desert Sign, and attempted interference," with Respondents' contracts "through the use of threats, intimidation, and other wrongful conduct."

REASONS FOR DENYING THE PETITION

I.

HOW THE ORDINANCE WORKS

The petition should be denied because the Ninth Circuit decided this case correctly and did so well within the bounds of this Court's prior decisions. The fundamental characteristic of the Ordinance is that it regulates signs on the basis of content. The sign categories the Ordinance regulates have content built into their very definitions The Ordinance's most basic definitions are those of "Outdoor Advertising Sign" and "Outdoor Advertising Structure" set forth in § 19.2 b. and c. These definitions are stated in physical terms. The content-based definitions are built on these physical ones.

As discussed above, a Display is defined (§ 19.2 a.) as an outdoor advertising sign or structure used to display a political or other off-premise message. Similarly, § 19.2 d. defines four categories of exempt signs ("Exempt Signs") in terms of the messages the signs convey. Section 19.2 e. defines "On-Site Advertising Structures and Signs" as structures and signs that bear a message relating to "goods sold, business conducted or services rendered on the parcel of land upon which the sign is located." Section 19.2 1. defines a "For Sale" sign as a sign "advertising that the property or structure upon which the sign is located is for sale, lease or rent."

Each of the above categories is based on the content of the message the sign conveys. For example, if a sign states "Smith's Grocery" on the site of a grocery store, it is an On-Site Sign, but if it reads "Smith for

Mayor," it is a Display.

Having defined its regulatory categories, the Ordinance then subjects them to various zoning restrictions. The strictest zoning regulations are imposed on Displays, i.e. signs and structures used for political or off-site messages. Section 19.3 a. (1) restricts Displays to three heavy industrial and commercial zones. Section 19.3 (Appendix at B-4, B-7) also requires a conditional use permit for Displays only.

On-Site Signs are subjected to less strict regulation. In discovery, Petitioners admitted that such signs are allowed in all commercial areas of the City (not just the three where Displays are allowed), and that 95% of such signs bear commercial messages. Section 19.5 provides that For Sale Signs are allowed not just in the three zones open to Displays, but "in all zone classifications" subject to size and number regulations. An undefined sign category, Subdivision Signs (§ 19.6), is allowed "within the boundaries of a subdivision," presumably within residential zones where political signs and other Displays are forbidden. From the above it is clear that the Ordinance regulates signs on the basis of content. This fact is of fundamental importance in evaluating its constitutionality. *See City of Ladue v. Gilleo, 512* U.S. 43, 114 S,Ct 2038 (1994) (O'Connor, J., concurring).

II.

THE PERMIT REQUIREMENT IS BASED ON UNCONSTITUTIONALLY VAGUE "STANDARDS"

The Ordinance's permit requirement only applies to Displays (§ 19.3, 19.3 c.). Since the definition of Displays is content-based, so is the permit requirement. Further, as shown above, § 419.3 allows the City to deny a permit on the basis of such subjective and amorphous standards as "the welfare of the general public" and "the aesthetic quality of the community." Such non-standards are unconstitutional under the line of cases including *Shuttlesworth,* 394 at 150-151 and *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 108 S. Ct. 2138 (1938). The Ninth Circuit thus applied the right legal standard to the permit requirement and reached the right result. There is nothing to be gained in this Court's granting certiorari with respect to this issue.

III.

THE ORDINANCE FAILS THE *CENTRAL HUDSON* TEST AS TO COMMERCIAL SPEECH

The Ninth Circuit applied the well-known test for regulation of commercial speech that this Court articulated in *Central Hudson*. The court reasoned that the Ordinance lacked a statement of purpose that would allow the City to show that it adopted the Ordinance to further a substantial governmental interest. The City further failed to present any evidence that the Ordinance promoted such interests. The Ninth Circuit relied on the relevant decisions of this Court (Appendix at A-10). The court therefore applied the correct rule of law and reached the proper result. As this Court's Rule 10 makes clear, certiorari is rarely granted to review even an erroneous application of the right legal standard. Certiorari should not be granted to review the Ninth Circuit's correct application of the proper legal standard.

IV.

THE ORDINANCE IS UNCONSTITUTIONAL AS TO NONCOMMERCIAL SPEECH

As shown above, the Ordinance restricts Displays, *i.e.*, signs that bear political or off-site messages, to only three zones. As also shown above, that restriction is based on content. Further, the Ordinance exempts four categories of signs from any restrictions, based solely on the content of the message such signs carry (§ 19.2d, Appendix at B-2). Such content-based regulation of noncommercial speech is unconstitutional under *Metromedia*, 453 U.S. at 513-514.

Equally unconstitutional is the Ordinance's placing greater zoning restrictions (three zones only) on political and other noncommercial Displays, while allowing commercial On-Site Signs in all commercial zones and allowing commercial For Sale Signs throughout the City. *Metromedia*, 453 U.S. at 513.

The Ninth Circuit's holding with respect to noncommercial speech thus reflects a straightforward application of the governing decision of this Court. Again, nothing would be gained by granting certiorari to review the Ninth Circuit's decision.

V.

THE NINTH CIRCUIT PROPERLY HELD THE WHOLE ORDINANCE UNCONSTITUTIONAL

The Ninth Circuit applied the rule that generally, only the unconstitutional part of a statute should be invalidated and the rest should be left intact. (Appendix at A-14.). But having held unconstitutional the permit requirement, the commercial and non-commercial sign regulations and the content-based exemptions, the court faced an ordinance that had been left without any significant regulatory provisions intact. Under these circumstances it was entirely appropriate for the court to invalidate the whole Ordinance. Again, the Ninth Circuit applied the proper legal rule and reached the right result. To grant certiorari with respect to the severance issue therefore would be pointless.

VI.

THE NINTH CIRCUIT PROPERLY HELD THAT QUALIFIED IMMUNITY WAS NOT AVAILABLE TO THE INDIVIDUAL DEFENDANTS

In holding that the individual Petitioners are not entitled to qualified immunity, the Ninth Circuit applied the correct legal standard, as articulated by this Court in *Harlow v. Fitzgerald*, 457 U.S., 800, 102 S.Ct. 2727 (1982). The court reasoned that, in attempting to enforce the Ordinance, the individual Petitioners had acted in contravention of established law and thus were not entitled to qualified immunity. The court's reasoning and result were correct, Again, no point would be served by granting certiorari to review this issue.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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April 21, 1997

Certificate of Service

Herewith are 40 copies of the Respondents' Brief in Opposition in No. 96101497

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I hereby certify that I am this day serving the foregoing document (3) copies upon the person(s) and in the manner indicated below. Service by first-class mail addressed as follows:

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